Supreme Court, U.S.
FILED

98 633 OCT 13 1998

OFFICE OF THE CLERK

No._____

IN THE UNITED STATES SUPREME COURT

October Term 1998

WILLIE J. DUNN,

Petitioner

v.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, ET AL.

On Petition for Writ of Certiorari
to the Supreme Court of Alabama

Petition for Writ of Certiorari

Willie J. Dunn, pro se
1517 3rd Street, West
Birmingham, AL 35204
(205) 326-1318

54 pp

PUBLISHER'S NOTE:

Page number(s) _____ could not be located.

A. List of Parties

Pursuant to Rule 21 (1)(b) petitioner discloses the names of all parties to these proceedings:

Alabama Agricultural and Mechanical University

Alabama Court of Civil Appeals

Board of Trustees:

- Brady, Betty M.
- Davis, Richard D.
- Folsom, Jr. James, Governor
- Hill, Edwin
- Henson, David B., President of the University
- Lyons, Jr. Sage
- Maisel, Elliot
- McNair, Chris
- Perry, Sr. Franklin
- Ponder, G. W.
- Speller, Malcolm
- Tucker, Oscar D.

- Walker, Cliff

Circuit Court for Madison County, Alabama

Grievance Committee:

- Hudson, Joe

- Mixon, Herman

- Thompson, James

B. Table of Contents

Questions Presented i

Listing of Parties iii

Table of Contents iv

Table of Authorities v

Citations of Official Opinions/Order 1

Jurisdictional Statement 1

Constitutional Provisions and Statutes 2

Statement of the Case 3

Argument 9

Conclusion 19

C. Table of Authorities

Cases:

Adicks v. S. H. Kress and Company, 398 U.S. 144 90 S.Ct. 1508, 26 L.Ed.2d 142 (1970) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 9,12,14

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 16,17

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed.2d 265 (1986) 11,14

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1984) 15

General Electric Co. v. Joiner, 520 U.S.____, 118 S.Ct., 512, 137 L.Ed.2d 325 (1997) 11

Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725 (1987)16

Martin v. Guillot, 875 F.2d 839 (11th Cir. 1989) 16

Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) 18

Constitutional Provisions:

Fourteenth Amendment, U.S. Constitution 17,18

Federal Rules of evidence, 801 (d)(1) 10

Federal Statute:

42 U.S.C. § 1983 18

Citations of Official Opinions

(1) Memorandum Opinion - United States District Court Northern District of Alabama, Northeastern Division:

Breazeale v. Bd. of Trustees, 575 So.2d 1126 (Ala. Cir. App. 1991)

McKinney v. Pate, 20 F.3d 1550, 1554 (11th Cir. 1994)

(2) Order, Circuit Court of Madison County, Alabama: None.

(3) Opinion, Alabama Court of Civil Appeals:

Brown's Ferry Waste Disposal Center, Inc. v. Trent, 611 So.2d 226, 228 (Ala. 1992)

Carter v. City of Haleyville, 669 So.2d 812 (Ala. 1995)

Hand v. Greensprings Storage, 678 So.2d 1187 (Ala. Cir. App. 1996)

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)

Jurisdictional Statement

Jurisdiction found under 28 U.S.C. § 1331 and 28 U.S.C. § 1257.

(i) July 17, 1998. Rule 11, inapplicable.

(ii) Not applicable

(iii) Rule 12.5 not applicable

(iv) 28 U.S.C. § 1257 (3)

(v) Local Rule 29.4 (b) or (c) not applicable.

E. Constitutional Provisions

Article I, §§ 6 and 13, Constitution of Alabama (1901)

Fourteenth Amendment, U.S. Constitution

Statement of the Case

This is a case to compel University officials to perform a legal duty owed to Dunn for refusing or failing to accord procedural due process set-out in the Staff Handbook at a post-termination hearing held October 15, 1993. These procedures called "Grievance Procedures" were adopted by the Board of Trustees on June 22, 1989. Dunn was required to sign for a copy of the handbook. It stated that after three months of probation, he would obtain permanent employment status. He would no longer receive annual contracts but "Notice of Continued Employment-Staff contracts." Dunn was employed January, 1989.

The complaint alleged that the University deprived Dunn of a constitutional protected right in property (employment) by refusing or failing to: (1) serve notice that Dunn's attorney could not represent he at his hearing, because of a long standing tradition; (2) serve notice of the names and nature of adverse witness testimonies at least ten (10) day before the

hearing; (3) serve notice that the Grievance Committee would not send its findings and recommendations directly to the President (Dr. Henson); and (4) serve notice that Dr. Henson would not act to rescind or accept the Committee's recommendations within ten (10) days after receipt. That because these procedurals were binding on the University once adopted by the Board, Dunn's termination was unlawful.

On September 1, 1994, the University removed this case to the federal district court under 42 U.S.C. § 1331 (original jurisdiction) and 28 U.S.C. § 1441 (b). On October 3, 1994, the federal court remanded this case, dismissing all federal procedural due process claims, (C-4-I-36).

On December 5, 1994, the complaint was amended (C-7-I-62-71). It demanded trial by struck jury. The University never answered the complaint. It filed an answer to the amended complaint on January 31, 1997 (C-20-II-343) denying all material allegations and setting-up five defenses. An objection was filed based on untimelessness (C-23-II-351).

On April 16, 1997, the trial court granted summary judgment (C-26-III-357-363) to the University. The order held with respect to Dunn's procedural due process claims that:

> "The Court finds that all of the federal claims asserted in the Amendment to Complaint were specifically dismissed by Judge Nelson in the referenced Order, and that such dismissal is res judicata to those issues in the Amendment to Complaint. Alternatively, the Court finds that the rationale and authorities presented by Judge Nelson in his Order and Memorandum of opinion are applicable and that any claims based on the United States Constitution and 42 U.S.C. § 1983 are to be dismissed." (C-26-II-360)

On motion to vacate or amend the order, Dunn showed the existence of material evidence the trial court had not considered (C-28-III-408-413-415-7-422); conflicts in sworn statements (C-12-I-102-107; C-16-II-268; C-27-II-365-7; C-32-

III-494; C-27-365 at n. 1-3); and the need to continue discovery (C-30-III-427). All motions denied (C-33-III-506-7).

In the Alabama Court of Civil Appeals Dunn argued that it was unconstitutional to be deprived of a right in property pursuant to the 14th Amendment to the U.S. Constitution and that 42 U.S.C. § 1983 provided a remedy therefore. On February 27, 1998, the judgment was affirmed, holding:

> With regard to Dunn's federal constitutional and § 1983 claims, the district court found that Dunn's claims were ambiguous and could be read as state law claims. The district court also found that Dunn had an adequate state remedy for the loss of his employment. The district court, citing McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), dismissed Dunn's constitutional and § 1983 claims on the ground that he failed to state a claim upon which relief could be granted.

> Under McKinney, if a plaintiff has an adequate state remedy for the deprivation of property, i.e. his employment, then the plaintiff has not suffered a violation of his procedural due process rights. Dunn was permitted to participate in a grievance (pre-termination) hearing and invoked the jurisdiction of this court to review the termination of his employment. Therefore, Dunn has been afforded post-termination review of the loss of his employment. Accordingly, we conclude that Dunn has not suffered a violation of his federal procedural due process rights and that, under McKinney analysis, he failed to state a claim upon which relief could be granted." (Opinion of the Court of Civil Appeal of Alabama, p. 7-8) (Appendix A, p. 9)

A timely petition for rehearing was filed arguing that material evidence had not been considered. The petition was denied without comment (Appendix C, p. 12).

On petition for writ of certiorari, the same set of facts were presented to The Supreme Court of Alabama. The writ was denied on July 17, 1998 (Appendix D, p. 13).

Argument

1. The Opinion of the Alabama Court of Civil Appeals in deciding a question of federal law pursuant to the Due Process Clause of the 14th Amendment to the U.S. Constitution conflicts with decisions of this Court on the same issue of law. That is, "summary judgment will not lie if the dispute about a material fact is genuine..." Anderson v. Liberty Lobby, Inc. 4777 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 1986. The material fact is whether Dr. Henson received the Grievance Committee's findings and recommendation directly from the Committee on October 28, 1993 (Appendix E, p. 20) and then attempted to conceal it by partially blackening out the month and date (C-12-I-114; C-29-III-409-412).

Dunn contends that this was a dispute about a material fact because the date at C-12-I-114 can easily be read while the date at C-29-III-412 can not. Which leaves Dunn to conclude that the University attempted to conceal the date. Therefore,

Dunn should have at least been allowed to continue discovery (C-30-III-426-30) because the outcome was crucial to his case.

Furthermore, Dunn contends that the evidence showed genuine facts in dispute: (1) Dunn's hearing was held on October 15, 1993. The Committee rendered its recommendation on October 22, 1993. Grievance Procedures required that the Committee renders its recommendation to Dr. Henson within ten (10) working days following the hearing and Dr. Henson was required to act within ten (10) working days following receipt (Appendix D, p. 15). In sworn statements Lois Thompson stated that the Committee relayed its recommendations to her (C-12-I-107) and she forwarded it to Dr. Henson. She then contradicts herself stating that the recommendation was first sent to Dr. Henson and she received a copy (C-32-III-492). Under Federal Rules of Evidence 801 (d)(1) these inconsistent statements were substantive evidence; (2) for the Appeals Court to hold that Dunn did not "present substantial evidence demonstrating the existence of a general

issue of a material fact..." (Appendix A, p. 7) shows that it did not consider evidence in the record. This was abuse of discretion. General Elec. Co. v. Joiner, 520 U.S. _____, 118 S.Ct. 512, 517, 137 L.Ed.2d 325 (1997). Dr. Johnson recommended Dunn's termination on the quality of his work (C-16-I-156). Yet, the Appeals Court did not consider evidence which showed that Dr. Johnson removed Dunn's secretary, typewriter and graduate assistant (C-29-III-415); and (3) for the Appeals Court to hold that Dunn suffered no injury (Appendix A, p. 6) is unsupported by the evidence. Dunn was hospitalized for job related stress (C-29-III-416-7) with doctor's orders to stay away from the job (C-32-III-438). The University's argument that the evidence was inadmissable (C-32-III-499-05) was apparently accepted by the Appeals Court. This was reversible error because under Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), Dunn was not required to submit evidence admissible at trial.

On the basis of this Court's holding in Anderson, 477 U.S. at 254, 106 S.Ct. at 2513 and Adicks v. S.H. Kress and Company, 398 U.S. 144, 158-9, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970) Dunn is petitioning this Court to grant certiorari to determine whether the Opinion of the Appeals Court conflicts with this Court's decisions in Anderson and Adicks to the extent that Dunn's evidence met the substantial standard and should have gone to a jury.

2. Dunn further contends that the Opinion of the Court of Civil Appeals conflicts with this Court's decision under Celotex. The University failed its initial burden of production: Celotex, 477 U.S. at 336-7, 106 S.Ct. at 2559.

When the University based its motion on the belief that there were no genuine issues of material fact (C-13-I-123) it could not ignore material evidence in the record which showed the existence of genuine facts in dispute. For example, defendant's Exhibit 8 and C-29-III-413-4 showed that Dr.

Johnson changed Dunn's evaluation after he signed it (C-16-I-171) in order to justify his below satisfactory job rating.

The University also failed to produce the last page of Exhibit 8 which contradicted Dr. Johnson's statement that she was recommending termination because of poor job performance (C-12-I-122). Substantial evidence showed that Dr. Johnson removed Dunn's secretary, typewriter and graduate assistant (C-29-III-415) as early as January 1993. There was also substantial evidence which showed ACT's disdain with Dunn's research, strongly suggesting that he relocate to Chicago or he would be hearing from them (C-29-III-410 & 422).

The evidence showed that Dr. Johnson constantly called and harassed Dunn on the telephone (C-32-III-451) and told he that if he were to go to court he would never get another job (C-32-III-439). Dunn contends therefore that the evidence did not support the judgment.

Dunn is petitioning this Court to grant certiorari to decide whether the University failed to carry its initial burden of production under Celotex, 477 U.S. at 336, 106 S.Ct. at 2559, analysis foreclosed a summary judgment. That under Anderson, 477 U.S. at 250, 106 S.Ct. at 2511, Dunn's substantial evidence "set forth specific facts showing that there is a genuine issue for trial." Id.

3. The opinion of the Court of Civil Appeals held that since Dunn received notice of the hearing, it satisfied procedural due process" protected by the Constitution of the United States and this State... when one's life, liberty or property are about to be affected by government action." (Opinion, Appendix A, p. 8)

Dunn contends that this was error because the University refused to served notice: that Dunn's attorney could not represent he; that no list of witnesses would be provided at least ten (10) days prior to the hearing; that the Grievance Committee would not relay its findings and recommendations

directly to the President; and that the President would not act to rescind or accept them within ten (10) working days after receipt.

Our argument is that because the University failed to follow its written policy governing grievance procedures, the failure to serve notice as noted above, rose to the level of denial of procedural due process.

Illustrative of this argument is Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 535/6, 105 S.Ct. 1487 1490-1, 84 L.Ed.2d 494 (1985) to the extent that Loudermill was provided grievance procedures via statutory provisions. By the same token, the Staff Handbook provided Dunn grievance procedures of which the University refused to follow. In other words, the University could not selectively serve notice of the hearing while refusing to serve notice of other rights setout in the Staff Handbook.

The Eleventh Circuit has held that notice of the names of adverse witnesses and the nature of their testimony was the

minimum procedural due process required. Martin v. Guillot, 875 F.2d 839, 844 (11th Cir. App. 1989).

Dunn is petitioning this Court to grant certiorari to decide whether the manner in which the hearing was held "contravene[d] Due Process." Board of Regents v. Roth, 408 U.S. 564, 574, 92 S.Ct. 2701, 2707, 33 L.Ed. 2d 548 (1972).

4. A unilateral contract was created when Alabama A & M issued Dunn its Staff Handbook approved by the Board of Trustees June 22, 1989 (C-12-I-109) and through the issuance of Notice of Continuing Employment Staff (C-28-III-408) for academic years 1989-1993. Here, the holding in Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 726 (Ala. 1987) provides that the acceptance of the Staff Handbook "implied an obligation of good faith and fair dealing and even if such obligation was not necessarily implied by law, such obligation existed when handbook indicate[s]." Hoffman at 726. Dunn could not be terminated unless he was provided procedural due process. (C-7-I-65). Therefore, when the Board adopted

grievance procedures in conjunction with the signing for his Staff Handbook combined with acceptance continued employment contracts a unilateral contract was created. Dunn could not be terminated except in accordance with grievance procedures set-out in the Staff Handbook.

This Court is being asked to grant certiorari to determine whether the Due Process Clause of the 14th Amendment to the U.S. Constitution protects rights stated in Staff Handbook.

5. Roth established the standard that a hearing was essential in a termination case to clear one's good name when false charges stigmatizes he. Dunn was provided a hearing. The Committee cleared he of any wrong doing. Yet in the five (5) years since his termination he is unable to secure employment in higher education. For example, at Sinclair Community College in Dayton, Ohio, Dunn was all but assured he would be employed as an administrator. Dr. Parker told he that she would have to check with Alabama A&M. Dunn did not get the job. This has repeated itself time and again.

This Court has held that in order to state a claim of stigmatization there must be either a public statement or some such evidence or "by those whose acts may fairly be said to represent official policy." Owen v. City of Independence, Mo., 445 U.S. 622, 633, 100 S.Ct. 1398, 1406, 63 L.Ed.2d 673 (1980). But there is this gray area in which a comment via the telephone or some other such electronic communications is not subject to the print media. This Court has not decided when circumstantial evidence of stigmatization rises to the level of 14th Amendment violation.

This Court is being asked to decide whether circumstantial evidence of stigmatization connected with Dunn's termination may rise to the level of "causing the infringement of ...constitutional rights in violation of section 1983." Id. Owen and the Due Process Clause of the 14th Amendment to the U.S. Constitution.

Conclusion

This Court may exercise its jurisdiction on certiorari to review a state court's decision if the holding causes direct and specific injury to petitioner, and the Article III requisites of the case are met. Petitioner alleges that he possesses standing to invoke federal authority he can track his injury directly to the erroneous holding of the trial court that the Federal District Court's dismissal of federal procedural due process claims were applicable to amended complaint under the doctrine of res judicata. The charges of wrong doing were left intact. This has caused such injury to petitioner that he has been unable to secure employment in higher education.

That decision could be redressed by a favorable decision of the Supreme Court. The parties remain adverse and the judgment altered tangible legal rights.

Willie J. Dunn, pro se
1517 3rd Street, West
Birmingham, AL 35204
(205) 326-1318

No._____

IN THE UNITED STATES SUPREME COURT

October Term 1998

WILLIE J. DUNN,

Petitioner

v.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, ET AL.

On Petition for Writ of Certiorari
to the Supreme Court of Alabama

Appendix

Willie J. Dunn, pro se
1517 3rd Street, West
Birmingham, AL 35204
(205) 326-1318

Table of Content

Appendix Page

A - Opinion, Alabama Court of Civil Appeals 1

B - Application for Rehearing 13

C - Judgment, Petition for Writ of Certiorari 14

D - Fourteenth Amendment & 42 U.S.C. § 1983 15

E - Excerpts, Staff Handbook 16

F - Recommendations, Blacked Out Received Date 24

ALABAMA
COURT OF CIVIL APPEALS

OCTOBER TERM, 1997 - 98

2961212 AND 2961257

Willie J. Dunn

v.

Alabama Agricultural and Mechanical University et al.

Appeals from Madison Circuit Court

(CV-94-1510)

WRIGHT, Retired Appellate Judge

In 1989 Alabama Agricultural and Mechanical University (A&M) employed Willie J. Dunn as the coordinator of testing. Dunn's title was later changed to director of testing services. His duties were to oversee the administration of various tests and the preservation of test results. The principal test that

Dunn administered was the American College Testing Assessment (ACT).

In February 1992 ACT officials notified Dunn that they were terminating their relationship with him and that he could not be involved "in any capacity" with the administration of the ACT test. ACT officials also notified A&M that they had terminated their relationship with Dunn because, they said, Dunn failed to cooperate with their investigation of a testing irregularity that occurred in a test administered by Dunn. In May 1993 Dunn's superior, Dr. Fran Johnson, notified Dunn that she was recommending the termination of his employment because, she said, he could not perform the full range of his responsibilities since ACT officials had terminated their relationship with him.

Dunn appealed Dr. Johnson's recommendation to Dr. Virginia Caples, then vice president for academic affairs. Dr. Caples upheld the termination of Dunn's employment, but changed the effective date of the termination from June 1,

1993, to July 1, 1993. Dr. Caples notified Dunn of her decision in a letter dated June 9, 1993. Dunn filed a grievance and requested a hearing, pursuant to the procedures specified in A&M's 1989 Staff Handbook (Handbook). On October 15, 1993, A&M's grievance committee held a hearing on Dunn's grievance. Dunn's attorney attended the grievance hearing and was permitted to make an opening and a closing statement. Dunn was permitted to cross-examine adverse witnesses.

On October 22, 1993, after a two-to-one vote, the grievance committee issued its recommendation--reinstate Dunn to a comparable position and pay him back wages. In a letter dated November 2, 1993, Lois Thompson, director of human resources, forwarded the grievance committee's recommendation to Dr. David Henson, the president of A&M. Dr. Henson received Thompson's correspondence on November 10, 1993. In a memorandum to Thompson, dated November 18, 1993, Dr. Henson rejected the grievance committee's recommendation and affirmed Dr. Johnson's

termination of Dunn's employment. Thompson forwarded a copy of Dr. Henson's memorandum to Dunn.

On August 4, 1994, Dunn filed a complaint in the Madison County Circuit Court against A&M, Dr. Henson, the individual members of A&M's Board of Trustees, and the three members of the grievance committee. Dunn asserted that A&M's Handbook, which required A&M to provide him with a list of witnesses 10 days before the grievance hearing and to permit his attorney to cross-examine witnesses during the grievance hearing. Dunn also asserted that Dr. Henson did not reject the grievance committee's recommendation within 10 days from his receipt of the recommendation, as required by the Handbook. Last, Dunn asserted claims of procedural due process violation under the Fourteenth Amendment to the United States Constitution, under 42 U.S.C. § 1983, and under Article I, §§ 6 and 13 of the Alabama Constitution of 1901. Dunn sought reinstatement, compensatory damages, a

declaratory judgment, relief in the nature of a writ of mandamus, punitive damages, and an attorney fee.

A&M, Dr. Henson, the trustees, and the grievance committee members filed a notice of removal and removed the case to the United States District Court for the Northern District of Alabama, Northeastern Division. Thereafter, the district court dismissed Dunn's federal procedural due process claims and remanded Dunn's remaining state claims to the Madison County Circuit Court.

On December 4, 1994, Dunn filed an amended complaint, restating his original claims and claiming that Dr. Henson did not reject the grievance committee's recommendation within 10 days after receiving the recommendation, as required by the Handbook. A&M, Dr. Henson, the trustees, and the grievance committee members filed a motion to dismiss the amended complaint.

Thereafter, A&M, Dr. Henson, the trustees, and the grievance committee members filed a summary judgment

motion, a statement of the undisputed facts, and supporting materials. Dunn filed a response to the summary judgment motion and supporting materials.

On April 16, 1997, the trial court granted A&M, Dr. Henson, the trustees, and the grievance committee members' summary judgment motion and entered a judgment in their favor. The trial court found that Dunn's federal claims asserted in the amendment to his complaint were the same claims dismissed by the district court and that the dismissal was res judicata to the claims asserted in Dunn's amended complaint. The trial court also found that Dunn proceeded with the grievance hearing "notwithstanding his knowledge and notice of the alleged deficiencies in the process." The trial court held that Dunn waived the "alleged Deficiencies." The trial court also found that Dunn suffered no injury as a result of the "alleged deficiencies," stating that "[t]he grievance committee could have granted [Dunn] no greater relief than its recommendation for reinstatement." The trial court further

found that Dr. Henson acted within 10 working days of his receipt of the grievance committee's recommendation, as required by the Handbook, and that Dunn was not deprived of due process of law. On May 15, 1997, Dunn filed a motion to alter, amend, or vacate the judgment; an objection to the judgment; and a motion to "correct facts." On July 17, 1997, after a hearing, the trial court denied Dunn's motions.

Dunn appeals[1], pro se, contending that A&M terminated his employment without affording him due process of law as guaranteed under the fourteenth Amendment to the United States Constitution and under Article I, §§ 6 and 13 of the Alabama Constitution of 1901 and that A&M violated his civil rights protected in 42 U.S.C. § 1983. He further contends that the trial court erred in holding that his federal constitutional

---

[1]Dunn filed two notices of appeal, the second notice was to correct deficiencies in the first notice. Both notices were docketed resulting in two case numbers for the same appeal.

and § 1983 claims were barred under the doctrine of res judicata and in entering a summary judgment in favor of A&M.

A motion for a summary judgment may be granted when no genuine issue of a material fact exists and the moving party is entitled to a judgment as a matter of law. Hand v. Greensprings Storage, 678 So. 2d 1187 (Ala. Civ. App. 1996). If the moving party makes a prima facie showing that no genuine issue of a material fact exists and that it is entitled to a judgment as a matter of law, the burden shifts to the nonmovant to present substantial evidence demonstrating the existence of a genuine issue of a material fact. Id.

Dunn argues that A&M terminated his employment without affording him due process of law because, he says, A&M did not allow his attorney to conduct the cross-examination of witnesses adverse to him and because he did not receive a witness list 10 days before the grievance hearing.

Chapter IX of the Handbook provides the following, in pertinent part: "a staff member shall have the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and examine all documents and other adverse demonstrative evidence." A&M's interpretation of this chapter is to allow a staff member's attorney to present an opening and a closing statement, but not to permit the attorney to direct or cross-examine witnesses. The record reflects that A&M was not represented by counsel at the grievance hearing, but that A&M's director of human resources presented A&M's side to the grievance committee. The Handbook also states that "[a] list of witnesses to be heard shall be submitted to all parties ten days in advance of the hearing." The record reflects that neither side exchanged a witness list.

"[P]rocedural due process, protected by the Constitutions of the United States and this State, requires notice and an opportunity to be heard when one's life, liberty, or property

interests are about to be affected by governmental action." Brown's Ferry waste Disposal Center, Inc. v. Trent, 611 So. 2d 226, 228 (Ala. 1992). See also Carter v. City of Haleyville, 669 So. 2d 812 (Ala. 1995).

Although Dunn's attorney was not permitted to direct or cross-examine witnesses and Dunn did not receive a witness list 10 days before the grievance hearing, Dunn did receive notice of the grievance hearing and did have an opportunity to be heard. Accordingly, we conclude that A&M did not deny Dunn procedural due process.

With regard to Dunn's federal constitutional and § 1983 claims, the district court found that Dunn's claims were ambiguous and could be read as state law claims. The district court also found that Dunn had an adequate state remedy for the loss of his employment. The district court, citing McKinney v. Pate, 20 F.3d 1550 (11th cir. 1994), dismissed Dunn's constitutional and § 1983 claims on the ground that he failed to state a claim upon which relief could be granted.

Under McKinney, if a plaintiff has an adequate state remedy for the deprivation of property, i.e. his employment, then the plaintiff has not suffered a violation of his procedural due process rights. Dunn was permitted to participate in a grievance (pre-termination) hearing and has invoked the jurisdiction of this court to review the termination of his employment. Therefore, Dunn has also been afforded post-termination review of the loss of his employment. Accordingly, we conclude that Dunn has not suffered a violation of his federal procedural due process rights and that, under the McKinney analysis, he failed to state a claim upon which relief could be granted. McKinney, supra. Although the trial court held that Dunn's federal constitutional and § 1983 claims were barred under the doctrine of res judicata, our supreme court has held that the judgment of a trial court will be affirmed if the court reached the correct result, even if the court gave the wrong reason. Morrison v. Franklin, 655 So. 2d 964 (Ala. 1995).

Based upon the foregoing, we conclude that there was no genuine issue of material fact and that A&M, Dr. Henson, the trustees, and the grievance committee members were entitled to a judgment as a matter of law.

The judgment of the trial court is due to be affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the provisions of § 12-18-10 (e), Ala. Code 1975.

AFFIRMED.

All the judges concur.

John H. Wilkerson, Jr., Clerk of the Court Of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 27th day of Feb, 1998

Appendix B

April 03, 1998

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: **2961212/2961257**

Willie J. Dunn v. Alabama Agricultural and Mechanical University, et al. (Appeal from Madison County Circuit Court: CV 94-1510).

Willie J. Dunn v. Alabama Agricultural and Mechanical University, et al. (Appeal from Madison County Circuit Court: CV 94-1510).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing. 39 (k) Motion Denied.

John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

Appendix C

IN THE SUPREME COURT OF ALABAMA

July 17, 1998

1971246

Ex parte Willie J. Dunn. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Willie J. Dunn v. Alabama Agricultural and Mechanical University, et al.) (2961212 and 2961257) (Madison: CV-94-1510)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

HOOPER, CJ. - Maddox, Shores, Kennedy and See, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that he foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 17 day of July 19 98 .

Clerk, Supreme Court of Alabama

Fourteenth Amendment

ARTICLE XIV

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appendix E

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY

Normal, Alabama 35762

STAFF HANDBOOK

APPROVED BY THE BOARD OF TRUSTEES,

JUNE 22, 1989

CHAPTER IX

GRIEVANCE PROCEDURE

A. GENERAL POLICY

Staff members may use the Grievance Procedure to seek redress of complaints arising out of terms or conditions of employment, i.e., race, sex, age, religion, handicap, veteran status, etc. Other grievances are dealt with under conventional procedures. This process consists of three basic steps: (1) attempts to remedy the situation through informal administrative channels; (2) convening an impartial committee to hear the complaint and to make recommendations to the President; and (3) a review and decision by the President.

B. PROCEDURE

Step One - An employee having a complaint or grievance should first discuss the matter orally with the first level supervisor within ten (10) working days of the incident. The

supervisor should consider the grievant's request and render an oral decision within five (5) working days of the discussion.

Step Two - Failing satisfactory adjustment, the aggrieved employee shall, within five (5) working days following receipt of the supervisor's decision, reduce the grievance to writing, stating (1) the facts of the case, (2) the nature of the complaint, and (3) the adjustment desired. The written grievance shall be presented to the supervisor who shall give a written response to the grievant within five (5) working days.

NOTE: If the department head is the immediate supervisor, Step 1 should occur with the department head; then, if necessary, it should be processed to the dean or director as outlined in Step 2. The procedure should then proceed in the order of steps outlined.

Step Three - Conduct a hearing of the case, and render its findings and recommendations to the President of the University within ten (10) working days following the hearing. Such findings and recommendations shall be final unless the

President alters or rescinds the committee's recommendations within ten (10) working days after receipt of such.

C. PROCEDURE FOR FILING: If a staff member, having exhausted the administrative chain still feels that he/she has just cause for a grievance, he/she may petition for hearing before the grievance committee. The written request should be filed within 30 to 60 days of the occurrence giving rise to the alleged grievance. The statement should contain a brief account of events leading up to the grievance, specifying how the griever was affected by the action in question; a concise listing of dates of procedures taken to resolve the issue, including appeals; identification of the alleged grievance as it relates to the definition above; and a brief specification of the redress sought. A hearing may be requested only after the alleged grievance has been clearly identified with the person(s) against whom it is being directed and after reasonable efforts to resolve it, including appeals to immediate supervisors have failed.

UPON RECEIPT OF THE COMPLAINT, the Grievance Committee is to determine:

1. Whether the person(s) involved are subject to this procedure.

2. Whether the issue under consideration constitutes a grievance.

3. Whether the staff member(s) filing the grievance have complied with the Procedure for Filing above.

IF A REQUEST FOR A HEARING IS GRANTED, the hearing shall be held within twenty days after the request is received. The petitioner shall be given at least ten working days notice of the hearing. The Grievance Committee may, upon the petitioner's written request, extend the time prior to the hearing date, where circumstances warrant such extension.

THE HEARING

The hearing shall be closed to the public unless the member(s) and the Grievance Committee agree that it may be open. The staff member shall have the right to counsel, to

present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and examine all documents and other adverse demonstrative evidence. A written transcript of all proceedings shall be kept. Upon request, a copy of the transcript shall be provided to the faculty member at the institution's expense.

When a staff member's grievance concerns termination, demotion or other disciplinary actions, the burden of proof shall rest with the administration; justification for such actions shall be based on just cause. In such cases, the hearing shall begin with the administration presenting contentions upon which the decision was based.

In all other cases that involve an interpretation of the staff member's rights and entitlements (including promotion, internal transfer, etc.), the burden shall be on the staff member presenting contentions upon which the grievance is based.

The scope of the hearing will be limited to the subject matter described in the staff member's written request. When

the administration presents his/her contentions first, the staff member will be allowed to rebut those contentions and if the staff member presents his/hers first, the administrator will be allowed the same. Both parties will be allowed to present any testimonial and documentary proof.

There shall be no formal rules of evidence. Questions of procedures shall be resolved by the chair of the grievance committee. Personal contact concerning the grievance between committee and participants in the hearing prior to the formal meeting shall be limited to procedural matters only. All proceedings of the hearing shall be recorded on tape.

Each party may present its own witnesses and if it is so desired, the committee may also call witnesses of its own. A list of witnesses to be heard shall be submitted to all parties ten days in advance of the hearing. With permission of the chair of the Grievance Committee, this time may be reduced to five days. The presence of witnesses at the hearing is the responsibility of the party calling the witnesses. University

employees shall be excused to participate in the hearing. Each witness may be questioned.

To: Dr. David Henson, President
Mr. Charles H. Pullen, Esq.
Mrs. Lois Thompson, Human Resources
Dr. Virginia Caples, VP for Academic Affairs

From: Member of the Hearing Committee

Date: October 22, 1993

Re: Willie J. Dunn vs. Alabama A & M University

BACKGROUND

This matter involves Dr. Willie J. Dunn as complainant and Alabama A&M University as defendant. In this action, Dr. Dunn was represented by his attorney, Mr. Charles H. Pullen. The University was represented by Mrs. Lois Thompson, Director of Human Resources. Mrs. Thompson was assisted in this effort by Dr. Fran Johnson, former Dean of University College.

Supreme Court, U.S.
FILED
DEC 3 1998
CLERK

No. 98-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIE J. DUNN,

Petitioner,

vs.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION

MELISSA W. LARSEN
Counsel of Record
SIROTE & PERMUTT
Attorneys for Respondents
200 Clinton Avenue N.W.
Suite 1000
Huntsville, AL 35804
(256) 536-1711

150003

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Factual Background	1
Reasons for Denying the Writ	8
I. Dunn's Petition For Writ Of Certiorari Should Be Denied As There Is No Conflict Between The Decision Of The Alabama Court Of Civil Appeals And Any Decision Rendered By This Court.	8
II. Certiorari Should Be Denied To The Extent Petitioner Seeks A Review By This Court Of Whether The Evidence Before The Circuit Court Supported The Grant Of Summary Judgment To The Respondents.	11
III. Certiorari Should Be Denied As The Remaining Claims Sought By Dunn To Be Reviewed Involve No Federal Question Or Issue And Concern Purely State-Law Issues.	12
IV. Dunn Should Not Be Permitted To Assert, For The First Time, A New Claim In His Petition For Writ Of Certiorari.	14
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

American Radio Association v. Mobile S. S. Association, 95 S. Ct. 409 (1974) 11

Hoffman-LaRoche, Inc., v. Campbell, 512 So. 2d 725 (Ala. 1987) 13

Maryland and Virginia Eldership of the Churches of God, et al. v. The Church of God at Sharpsburg, Inc., et al., 90 S. Ct. 500 (1970) 12

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 9

Taylor v. Freeland & Kronz, et al., 112 S. Ct. 1644 (1992) 14

Statute:

42 U.S.C. § 1983 ..... 8, 9, 10, 11, 13

United States Constitution:

Fourteenth Amendment 8

STATEMENT OF THE CASE

This action was originally commenced by the filing of Petitioner's Complaint in the Circuit Court of Madison County, Alabama on August 4, 1994. (R.4-15). On September 1, 1994, Respondents removed this action to the United States District Court for the Northern District of Alabama. (R.16-35). On October 3, 1994, the United States District Court dismissed all of Petitioner's federal procedural due process claims and remanded the remaining state law claims to the Circuit Court for Madison County, Alabama. (R.36-44).

On December 5, 1994, Petitioner filed his amendment to the Complaint. (R.62-71). On September 6, 1996, Respondents filed their Motion for Summary Judgment. (R.123-126). Respondents' Motion for Summary Judgment was granted on April 16, 1997. (R.357-363). The Petitioner appealed the grant of summary judgment to Respondents to the Alabama Court of Civil Appeals. The Alabama Court of Civil Appeals upheld the decision of the trial court on February 27, 1998. Petitioner's petitioned for rehearing before the Alabama Court of Civil Appeals, which was denied, and then petitioned for a Writ of Certiorari to the Alabama Supreme Court. Petitioner's writ was denied. Petitioner has now petitioned for Writ of Certiorari to this Honorable Court.

FACTUAL BACKGROUND

Petitioner, Willie J. Dunn (hereinafter "Dunn"), was initially employed by Alabama Agricultural and Mechanical University (hereinafter the "University") on January 17, 1989 as Coordinator of Testing. (R.120). Dunn's title was latter changed to Director of Testing Services. (R.120). Dunn's duties as Director of Testing included overseeing the administration of various tests given to the University's students, the principal

one of which was the administration of the ACT (American College Testing)[1] Assessment to incoming freshmen. Dunn was also responsible for the storage and safekeeping of those test results so that they would be available for research purposes. In addition to the ACT Assessment tests, the University's testing services also began the administration of another ACT test, the CAAP (Collegiate Academic Assessment Program). (R.120-121).

On February 12, 1992, Dunn was notified by ACT that it was terminating its relationship with him and that he could not be involved "in any capacity" with the administration of ACT Assessment tests. The University was advised that Dunn's relationship with ACT was terminated due to his failure to cooperate with the ACT's investigation of a testing irregularity which occurred in one of the tests Dunn administered at the University. (R.121).

In May of 1993 Dunn was notified by his Supervisor, Dr. Fran Johnson, that she was recommending his termination. One of Dr. Johnson's reasons for recommending termination was that Dunn was "unable to perform the full range of duties and responsibilities of the position because ACT has terminated its relationship with him." The ACT termination created the consequence that Dunn could not administer the Residual ACT Assessment that the University uses for admission and placement of entering freshmen, maintain ACT student profile sheets and respond to inquiries about student performance on the ACT/Residual ACT, administer any ACT-sponsored test, including the Collegiate Academic Assessment Program (CAAP) which is used to assess the effectiveness of the general (core) education curriculum, and service the Huntsville-Madison County community by administering the ACT to high

1. ACT is the national organization which provides standardized testing for colleges and universities.

school students. Dr. Johnson's second reason for recommending termination was that the quality of Dunn's work performance, his attitude toward the duties and responsibilities of his position, and his interactions with co-workers had deteriorated and was unacceptable. (R.121).

Dunn appealed Dr. Johnson's recommendation to Dr. Virginia Caples, the then Vice-President for Academic Affairs. Dr. Caples upheld Dunn's termination. However, Dr. Caples changed the effective date of the termination from June 1, 1993 to July 1, 1993. Dunn was notified of Dr. Caples decision by letter dated June 9, 1993. (R.122). Dunn chose to exercise his right to utilize the University's grievance process and on June 15, 1993, Dunn filed a grievance relating to his termination. (R.106)

Under the University's grievance process a staff member can contest an adverse employment action by filing a grievance and requesting a hearing before the grievance committee. (R.105). At the grievance hearing the staff member has

> the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and examine all documents and other adverse demonstrative evidence.

(R.106). The grievance hearing is not governed by formal rules of evidence. A list of witnesses to be heard is submitted to all parties ten days in advance of the hearing. (R.106).

The University's grievance process is an administrative remedy provided its employees by the University. The hearings are not intended to be conducted as formal trials. The University has consistently interpreted its Staff Handbook and policy as

allowing the employee to have counsel present with him during the hearing. The employee is free to consult with the attorney, however, the attorney is not allowed to personally participate in the hearing.[2] (R.106).

The grievance committee then issues its recommendation to the University's President within ten (10) working days from the conclusion of the hearing. (R.107). The recommendation of the grievance committee is final unless the President alters or rescinds the committee's recommendations within ten (10) working days of his receipt of the recommendation. (R.107).

A grievance hearing was held for Dunn on October 15, 1993. The members of the Grievance Committee which heard Dunn's grievance were Dr. James Thompson, Joe Hudson and Herman Mixon. (R.107).

Despite the fact that adverse witnesses were to be presented against Dunn, no list of witnesses was provided to Dunn prior to the hearing. (R.107). At the beginning of the hearing, Dunn's counsel advised the Grievance Committee that no list of witnesses had been provided. Dunn's counsel advised the Grievance Committee that regardless of this fact, Dunn wanted the hearing to proceed. (R.129). Dunn's attorney was present at the hearing and was allowed to make an opening and closing statement. (R.128). Dunn was also permitted, with his counsel's assistance, to cross-examine the adverse witnesses presented. (R.128).

---

2. The only known exception to this policy arose when a faculty member filed a grievance but was incarcerated at the time of his scheduled grievance hearing. Due to the special circumstances surrounding that situation, the University permitted the employee's attorney to stand in for him at the hearing. However, when the employee was granted a second hearing after his incarceration had ended, his attorney was not permitted to participate in that hearing. (R.106-107.)

Under the University's grievance procedure, the Hearing Committee is to render its findings and recommendations to the President within ten (10) working days following the hearing. (R.107). On October 22, 1993, as the result of a two (2) to one (1) vote, the Hearing Committee issued its recommendation that Dunn be reinstated to a comparable position and that he be paid back wages. (R.107). This recommendation was sent to the Director of Human Resources. (R.107-108). By letter dated November 2, 1993, Lois Thompson, Director of Human Resources, forwarded the recommendation of the Grievance Committee to the University's President, Dr. David Henson. (R.108).

The letter and recommendation were received in Dr. Henson's office on November 10, 1993. (R.45). Bessie Gibbs had the responsibility for receipt of written communications in the President's office directed to the President. (R.46). It is her normal practice and procedure to date stamp an item of correspondence on the day on which it is received by the President's office and to record the fact of receipt into a chronological log which she maintains on behalf of the President. (R.46). Ms. Gibbs received the Hearing Committee's recommendation by transmittal from Lois Thompson, the Director of Human Resources for the University, on November 10, 1993. (R.46). The grievance procedure provides that the President has ten (10) working days after his receipt of the grievance committee's recommendation to issue his decision, otherwise the recommendation of the committee becomes final. (R.107). On November 18, 1993, Dr. Henson issued his decision that he was rejecting the grievance committee's recommendation and upholding Dr. Johnson's original recommendation to terminate Dunn. (R.108).

Dr. Henson determined that it was in the best interest of the University to uphold Dunn's original termination. Dr.

Henson's decision was in no way based on the fact that only two of the three panel members had recommended reinstatement. It would have made no difference to Dr. Henson's decision making process if all three panel members had recommended reinstatement. (R.103). A copy of Dr. Henson's decision was forwarded to Dunn by Lois Thompson. (R.108). No member of the University's Board of Trustees was involved at any stage of this process, and took no action of any kind concerning Mr. Dunn. No relief or action was ever requested of the Board of Trustees. (R.108).

Dunn's original complaint attempted to state four (4) separate counts upon which Dunn sought to base his reinstatement to the University and an award of backpay and other damages. Counts I and II sought to assert a claim of violation of Dunn's procedural due process rights based upon the hearing Committee's alleged failure to follow the University Staff Handbook by refusing to allow Dunn unfettered right to counsel during his grievance hearing (Count I) and failing to provide Dunn with a list of witnesses which would be testifying against him prior to the grievance hearing (Count II). (R.8-10). The alleged constitutionally protected property interest of which Dunn claims he has been deprived without due process is his employment at the University.

In Count III Dunn alleged that the Staff Handbook establishes a period of ten (10) working days from the date on which the findings and recommendations of the Hearing Committee are received by the President of the University within which the President must act or such findings and recommendations become final and cannot thereafter be altered by the President. Dunn alleges that the period of ten *working* days expired before Dr. Henson, the University's President, took action to alter or rescind the Hearing committee's recommendation that Dunn be restored to a position comparable

to his former position and that he be paid back wages based on his period of termination. The University was alleged to have failed and refused to comply with the ten working day policy. Dunn gave no indication of the legal theory upon which he based his request for relief in Count III. (R.10).

With regard to each of the first three counts, Dunn sought a monetary judgment "against Defendants . . . in an amount equal to the amount of his lost wages plus interest and costs", and sought a declaration and Writ of Mandamus reinstating him at the University. Dunn also sought an award of attorney's fees. (R.8-10).

Count IV was allegedly asserted

> under the Fourteenth Amendment to the Constitution of the United States; under 42 U.S.C. Section 1983; and under the Alabama constitution of 1901, Article I, Sections Six and Thirteen

based upon an alleged violation of Dunn's due process rights. (R.11). The factual allegations upon which Count IV was based are essentially identical to and a combination of Counts I, II and III. (R.11). Count IV expressly sought judgment against "Defendants in their official and individual capacities" for compensatory damages

> in an amount equal to the amount of his lost wages plus interest and costs, or, in the alternative, a declaratory judgment and relief in the nature of a Writ of Mandamus declaring that Plaintiff has been deprived as alleged herein.

(R.12). Dunn also sought an award of punitive damages and attorney's fees in Count IV.

Named as Defendants in this action were University; David B. Henson, individually and in his official capacity as President of the University (hereinafter "Dr. Henson"); Governor James E. Folsom, Jr., Chris McNair, Cliff Walker, Sage Lyons, Jr., John Stallworth, Oscar D. Tucker, Richard D. Davis, Elliot Maisel, Betty M. Brady, Franklin Perry, Sr., G.W. Ponder, Edwin Hill and Malcolm Speller, individually and in their official capacities as members of the Board of Trustees of the University (hereinafter collectively referred to as the "Trustees"); Herman Mixon, James Thompson and Joe Hudson, individually and in their official capacities as member of the grievance committee which heard Dunn's grievance.

REASONS FOR DENYING THE WRIT

I.

DUNN'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ALABAMA COURT OF CIVIL APPEALS AND ANY DECISION RENDERED BY THIS COURT.

Contrary to Dunn's assertions, there is no conflict between any decision of the Alabama Court of Civil Appeals and prior decisions of this Court. Dunn's original complaint contained four claims. Counts I and II were due process claims brought pursuant to the Alabama Constitution. Count III was a state law quasi-contract claim and Count IV was a procedural due process claim under the Fourteenth Amendment to the United States Constitution brought pursuant to 42 U.S.C. § 1983. The allegations of Count IV were simply a compilation of the same allegations set out in Counts I through III. (R.4-15). After the filing of Plaintiff's Complaint, the Defendants removed the case to the United States District Court for the Northern District of

Alabama. The United States District Court dismissed all of the Plaintiff's federal claims[3] under the authority of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). (R.37-39). Under *McKinney*, an available and adequate remedy under state law to redress the procedural deprivation allegedly suffered determines whether the plaintiff has a maintainable claim under § 1983 for deprivation of rights to procedural due process. The United States Court of Civil Appeals for the Eleventh Circuit stated in *McKinney* that:

> As we mention above, unlike substantive due process violations, procedural due process violations do not become complete "unless and until the state refuses to provide due process." *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983. More specifically, in the case of an employment termination case, "due process [does not] require the state to provide an impartial decision maker at the pre-termination hearing. The state is obligated only to make available 'the means by which the employee can receive redress for the deprivations.' " *Schaper v. City of Huntsville*, 813 F.2d 709, 715-16 (5th Cir. 1987) (quoting *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981)) (footnote omitted).

McKinney, 20 F.3d at 1562-63. In the District Court's Memorandum of Opinion, the court noted that Dunn had adequate remedies available to him under state law and that Dunn had not expressed any dissatisfaction with the adequacy of those remedies. (R.38). Dunn's remaining state law claims were remanded to the Circuit Court for Madison County, Alabama. (*Id.*).

---

3. The District Court held that, to the extent Counts I and II attempted to assert federal due process claims, those claims were also dismissed. (R.38.).

Thereafter Dunn amended his complaint. Dunn's amended complaint added additional factual detail as well as asserted, as Count V, a new state-law quasi-contract claim. The amended complaint also replead the identical federal claim which had previously been dismissed by the District Court. The Defendants moved for summary judgment as to all of the claims asserted by Dunn in the Amended Complaint. In granting summary judgment to the Defendants on all claims, the Circuit Court of Madison County inadvertently stated that it was dismissing the Petitioner's federal claim on the basis that, as it had previously been dismissed by the United States District Court, the claim was now barred by res judicata. The Circuit Court went on to say that alternatively this claim was dismissed based on the same rationale as set forth by the United States District Court. (R.360). The Alabama Court of Civil Appeals, in upholding the Circuit Court's decision, noted the Circuit Court's inaccurate use of the term res judicata, but also pointed out that the decision could be affirmed as the court reached the correct result, even if it gave the wrong reason. (A.11).

With that background in mind, it is clear from a review of Dunn's petition that he does not understand the basis for the dismissal of this claim. Dunn's argument does not address whether under federal law he has stated a claim under 42 U.S.C. § 1983 for violation of his right to procedural due process. Dunn, instead, argues to this Court that certiorari should be granted because he claims that a genuine issue of material fact existed such that it was inappropriate for the Circuit Court to grant summary judgment. Dunn then attempts to reargue what he considers to be the summary judgment issues. As set out above, the Circuit Court did not address any factual issues with regard to Dunn's claim under § 1983. Both the United States District Court and the Madison County Circuit Court found that Dunn had failed to state a claim under § 1983.

The decision of the District Court and the Madison County Circuit Court is consistent with the rulings of this court and thus, there is no conflict in this case between the opinion of the Alabama Court of Civil Appeals and any opinion rendered by this or any other federal court. Rather, the Alabama Court of Civil Appeals agreed with the opinion of the United States District Court that Dunn had failed to state a claim under 42 U.S.C. § 1983 for violation of his procedural due process rights.

II.

CERTIORARI SHOULD BE DENIED TO THE EXTENT PETITIONER SEEKS A REVIEW BY THIS COURT OF WHETHER THE EVIDENCE BEFORE THE CIRCUIT COURT SUPPORTED THE GRANT OF SUMMARY JUDGMENT TO THE RESPONDENTS.

Dunn asks that this Court re-examine the evidence presented to the Circuit Court and make an independent determination as to whether or not that evidence sufficiently supported the Circuit Court's decision to grant summary judgment to the Respondents. It is well settled that, absent a showing of obvious error, it is not the province of this Court to review the factual findings of a state court when there is no federal question at issue. *American Radio Association v. Mobile S. S. Association*, 95 S. Ct. 409 (1974). The factual findings of the Madison County Circuit Court were reviewed by the Alabama Court of Civil Appeals, which upheld those findings. Dunn has not alleged that some type of extraordinary error exists, he merely disagrees with the findings of the Circuit Court and would have this Court reach a different result.

Further, in his argument, Dunn points the Court to several "facts" which he contends show that there were genuine facts in dispute. Dunn neglects to mention that the "evidence" which

he now offers to show that genuine issues of material fact exist, was found by the Circuit Court to be inadmissible and was not even offered to the Circuit Court until after summary judgment had been granted for the Respondents. (R.506-507).

There is no reason or basis for this Court to undertake a review of the factual findings of the Circuit Court, thus, Dunn's writ is due to be denied.

III.

CERTIORARI SHOULD BE DENIED AS THE REMAINING CLAIMS SOUGHT BY DUNN TO BE REVIEWED INVOLVE NO FEDERAL QUESTION OR ISSUE AND CONCERN PURELY STATE-LAW ISSUES.

It is fundamental to a determination of whether a petition for writ of certiorari to the United States Supreme Court should be granted, that the petition set forth an issue of federal law. *Maryland and Virginia Eldership of the Churches of God, et al. v. The Church of God at Sharpsburg, Inc., et al.*, 90 S. Ct. 500 (1970). Dunn has attempted to transform what were almost exclusively Alabama state-law claims, into questions of federal law.

The third issue raised by Dunn's petition is

> [w]hether under the Due Process Clause of the 14th Amendment to the U.S. Constitution petitioner had a constitutional right to notice that he would not be represented by counsel; no list of witnesses would be provided; and the President of the University would not abide by Staff Handbook?

(Pet. i). In addition to originally asserting that these alleged actions were violations of his procedural due process rights pursuant to § 1983, Dunn also contended that these actions violated his rights under the Constitution of the State of Alabama. As set out above, the Circuit Court did not reach any factual issues with regard to Dunn's § 1983 claim and properly dismissed it for its failure to state a claim under federal law. Both the Circuit Court and the Court of Civil Appeals found that Dunn's rights to due process under the Alabama Constitution had not been violated. Thus, there remains no federal issue for this Court to review.

Similarly, the fourth issue raised by Dunn's petition is

> [w]hether provisions stated in Staff Handbook signed for by petitioner detailing termination rights combined with a contract of continued employment may rise to the level of a unilateral contract?

(Pet. i). Whether the University's Staff Handbook and some alleged contract of continued employment created a contract, is an issue of purely state law. Dunn's quasi-contract claims raise no issue of federal law. Indeed, the only case cited by Dunn in support of his position that the University's handbook somehow created a contract between himself and the University, is a case decided by the Alabama Supreme Court, *Hoffman-LaRoche, Inc., v. Campbell*, 512 So. 2d 725 (Ala. 1987). Dunn does not contend that this Alabama Supreme Court case conflicts with any decision of this Court, rather, Dunn offers it in support of his position that a contract existed. After making the argument for the existence of a contract between himself and the University, Dunn then concludes his argument by asking this Court "to grant certiorari to determine whether the Due Process Clause of the 14th Amendment to the U.S. Constitution protects rights stated in Staff Handbook." (Pet. 17). Though he

attempts to articulate these claims as federal questions, Dunn is actually asking this Court to find that a state law contract existed. Dunn then asks that this Court find that his interpretation of the University's Staff Handbook is correct and that the University, thus, breached that contract. As these claims present no federal questions for this Court to review, Dunn's petition for writ of certiorari is due to be denied.

IV.

DUNN SHOULD NOT BE PERMITTED TO ASSERT, FOR THE FIRST TIME, A NEW CLAIM IN HIS PETITION FOR WRIT OF CERTIORARI.

In addition to attempting to recreate his state-law claims as federal claims, Dunn also has plead a claim to this Court which was never asserted in either his original or amended complaint. In the questions presented by Dunn for this Court to review, the last question is

> [w]hether false changes [sic] against petitioner have irreparably damaged his good name, professional reputation and deprived he of the right to a livelihood in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution?

(Pet. i-ii). In his argument, Dunn attempts to characterize this "claim" as a stigmatization claim, however, at no point, prior to its appearance in his Petition, has Dunn ever asserted this claim. A petitioner cannot assert a new claim in his petition for writ of certiorari. *Taylor v. Freeland & Kronz, et al.*, 112 S. Ct. 1644, 1649 (1992). As this claim was never plead by Dunn in either his complaint or amended complaint, his petition for writ of certiorari as to this claim, is due to be denied.

CONCLUSION

For the reasons set out hereinabove, petitioner's writ is due to be denied in its entirety.

Respectfully submitted,

MELISSA W. LARSEN
Counsel of Record
SIROTE & PERMUTT
Attorneys for Respondents
200 Clinton Avenue N.W.
Suite 1000
Huntsville, AL 35804
(256) 536-1711

Supreme Court, U.S.
FILED
DEC 16
CLERK

No. 98-633

In The

Supreme Court of the United States

October Term, 1998

WILLIE J. DUNN,

Petitioner,

v.

ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY, ET AL.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

WILLIE J. DUNN, *pro se*
1517 3rd Street, West
Birmingham, AL 35204
(205) 326-1318

4 pp

PETITIONER'S REPLY BRIEF

Avers that this Court may choose not to consider Respondents' Brief because it fails to comply with Rule 33(b), Rules of the Supreme Court.

Admits the University fired Dunn in retaliation to ACT accusing him of taking its tests for three students. (Resp. br., p. 2; R. 303-4) Denies *McKinney* (Resp. br., pp. 8-9) supported dismissal of federal claims. Avers that *McKinney* held that where there was an adequate post-termination remedy, procedural due process would be satisfied. (R. 37-8) Since the Alabama Court of Civil Appeals refused to have considered material evidence, Dunn avers that his post-termination remedy was inadequate. *Zinermon v. Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 982, 108 L.Ed.2d 100 (1990).

The Alabama Legislature (§ 16-49-20 et seq., Code of Alabama) vested "exclusive jurisdiction, power and authority" [and] "management and control" (R. 78) of the University in the Board of Trustees. The University did not have the power nor authority to deny Dunn grievance rights. It was the state system itself that denied Dunn procedural due process without proper safeguards. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 423, 102 S.Ct. 1148, 1148-51, 71 L.Ed.2d 265 (1982). (Dunn contends that he was deprived of procedural due process under established grievance procedures.) *Id.* Too, "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id. Zinermon*, 494 U.S. at 124, 110 S.Ct. at 982. (Resp. br., p. 9).

Under *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1930, 1923, 64 L.Ed.2d 572 (1980), Dunn was required to

make two allegations to state a claim for relief: (1) "that some person has deprived him of a federal right" and (2) "that the person who deprived him of that right acted under color of state law." *Id.* Counts I-III of the complaint (R.7-9) and counts I-III as amended (R.64-8) so stated. Dunn's federal constitutional claims depended upon his having a property right in continued employment. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 531, 538, 105 S.Ct. 1487, 1991, 84 L.Ed.2d 494 (1985). Avers that by virtue of Dunn's continued employment contract (R.408) he had acquired a property right in employment. Therefore, his complaint as amended stated a cause of action under 42 U.S.C. § 1983. *Id. Gomez; Maine v. Thiboutot,* 448 U.S. 1, 3, 100 S.Ct. 2502, 2503, 65 L.Ed.2d 555 (1980), *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30, 102 S.Ct. 1148, 1154-5, 71 L.Ed.2d 265 (1982).

Denies that Dunn was required to submit evidence admissible at trial to defect Respondents' motion for summary judgment based on this Court's holding under *Celotex.* (Resp. br., p. 12). *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553.

The opinion of the Alabama Court of Civil Appeals conflicts with this Court's holding in *Adicks, Anderson, Celotex, Gomez,* and *Logan.* It conflicts with it own opinion in *Curry v. Welborn Transportation,* 678 S.2d 158, 160 (Ala. Civ. App. 1996); and with that of the Alabama Supreme Court in *Rhodes v. Tractor & Equipment Co.,* 677 So.2d 194 (Ala. 1995) (reh.den.)

Avers that the issue of stigmatization was raised via "Motion To Alter Amend or Vacate Order Granting Defendants Summary Judgment" (R.367) and argued in open

court (R.506). Since Respondents never objected thereto, the issue is proper before this Court on the ground that it falls within the framework of deprivation of "substantive due process rights" (liberty and property). *Brennan v. Steward*, 834 F.2d 1248, 1256-7) (5th Cir. 1988).

Finally, Dunn demanded trial by struck jury. (R.12, R.71). The Seventh Amendment to the U.S. Constitution recognizes a right to a jury trial if the statute creates legal rights and remedies in an action for damages. Dunn contends that § 1983 so provides. *Carey v. Pipus*, 435 U.S. 247, 253-4, 98 S.Ct. 1042, 1046-7, 55 L.Ed.2d 252 (1978).

This Court is required to review the evidence in the light most favorable to Dunn. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513 such that the substantive law will determine which facts are material. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510.

The rights Dunn seeks to vindicate are protected under the Bill of Rights. Respondents have not denied this; in fact, they have not denied any facts or material allegations set forth in the Petition. Their only argument has been that Dunn's claims do not fall under federal law. *Gomez* holds to the contrary.

Dunn denies all factual statements and allegations set forth in Respondents' brief.

For the foregoing reasons, Dunn strongly suggests the grant of certiorari to protect substantive rights and to resolve the conflict.

WILLIE J. DUNN, *pro se*
1517 3rd Street, West
Birmingham, AL 35204
205/326-1318